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NTSB Order No. EA-3504

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 5th day of February, 1992

Petition of

LINDA J. WALKER

for review of the denial
by the Administrator of the
Federal Aviation Administration
of the issuance of an airman
medical certificate.

Docket SM-3679

OPINION AND ORDER

The Administrator has appealed from the initial decision that Administrative Law Judge Patrick G. Geraghty issued from the bench at the conclusion of an evidentiary hearing held May 17, 1989.¹ The law judge reversed the Administrator's June 30, 1988 final denial of airman medical certification (third class) to petitioner. Her disqualification was based on "a history of chronic pancreatitis requiring the use of

¹A copy of the oral initial decision, an excerpt from the transcript, is attached.

medications that are contraindicated for flying privileges."² Section 67.17(f)(2) of the Federal Aviation Regulations (FAR) (14 C.F.R. § 67.17(f)(2))³ disqualifies applicants on the basis of a medical history of a disease, defect, or limitation that carries with it an unacceptable risk to aviation safety. The Federal Air Surgeon's disqualification letter also denied an exemption ("special issue," see 14 C.F.R. § 67.19).

Petitioner's condition is now being treated with three medications taken once or twice a day: codeine (30 mg.); Imodium (2 mg.); and Levsin (.125 mg.). Based upon his

²The parties appear to agree that "pancreatitis" is not the correct diagnosis. Petitioner believes her malady is termed "steatorrhea," and she has been so diagnosed. The Administrator's witness, Dr. Luross (see infra), believes petitioner is suffering from a spastic colon. Tr. at p. 119. The difference is not material here. In either event, the ailment is manifested as lack of bowel control.

³FAR Section 67.17(a) requires compliance with subsections (b)-(f) to be eligible for a third class medical certificate. Subsection (f)(2) reads:

"§ 67.17 Third-class medical certificate.

* * * * *

(f) General medical condition:

* * * * *

(2) No other organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon finds--

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected, within two years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified medical judgment relating to the condition involved."

evaluation of the evidence presented, including the conclusions drawn by the two medical experts who testified, the law judge found that any risks represented either by petitioner's medical condition or by her medications are within acceptable limits and will not interfere with air safety in respect to her ability to perform the duties and exercise the privileges of the medical certificate for which she applied.

The Administrator is concerned with two different, but related, issues: any problems in aircraft operation that could be caused by the illness itself; and any effects on her performance caused by the medicines used by petitioner to control her condition. In the instant case, it is clear that, short of not eating, the petitioner is required to take the medications the Administrator found disqualifying if she is to control her condition. In his appeal, the Administrator urges that his evidence regarding the medications' side effects was not adequately addressed, and believes that a number of petitioner's past medical problems (e.g., dizziness, insomnia) were actually such side effects.

Petitions for review of denials of airman medical certificates are filed pursuant to Section 602(b) of the Federal Aviation Act, as amended (16 U.S.C. 1422). This section provides that, in determining whether the airman applicant meets the medical standards that apply to the certificate for which denial was issued, the Board shall not

be bound by the findings of fact of the Secretary of Transportation.⁴ However, in any proceeding under Section 602(b), the burden of proof is on the petitioner, i.e., the applicant. The Board reviews the expert medical testimony and draws conclusions based on the quality of the opinions. This quality depends on "the logic, objectivity, persuasiveness, and the depth of the medical opinion." Administrator v. Loomis, 2 NTSB 1293, 1294 (1975), aff'd sub nom. Loomis v. McLucas, 553 F.2d 634 (10th Cir. 1977).

Since petitioner has the burden of proof, we set forth her expert's testimony first. Petitioner's medical expert, Dr. Lincoln D. Clark, is Board-certified in psychiatry and neuropsychopharmacology.⁵ He testified regarding petitioner's medications, their interaction, and the risks they represent in her circumstances.⁶ Dr. Clark concluded that none of the three medicines -- either separately or together -- would affect her judgment, perception, or ability to react, nor would they affect her central nervous system. He testified that 30 mg. of codeine (the equivalent of the codeine in one Tylenol 3 tablet) was a small dose, that it served its purpose as prescribed for Ms. Walker, but was too

⁴The Secretary has delegated to the Administrator the duties required here in connection with airman medical certification. In turn, the Administrator has delegated these duties to the Federal Air Surgeon.

⁵His Curriculum Vitae and bibliography is Exhibit P-2.

⁶Dr. Clark had consulted with petitioner beginning in 1988, and as a result petitioner discontinued use of phenobarbital.

small to have a "psychoactive" effect. Dr. Clark saw no evidence in her medical history of side effects from these medicines, and expected none. Tr. at pps. 106-107.

The Administrator's medical expert, Dr. Richard M. Lueros, testified based on his review of petitioner's medical records (Exhibit A-1). Dr. Lueros is Board-certified in internal medicine and gastroenterology, and is a pilot. Dr. Lueros concurred in the Federal Air Surgeon's denial. In comparison to Dr. Clark's testimony, Dr. Lueros addressed the illness itself, the treatment of it, and specific aviation-related concerns.

As noted earlier, Dr. Lueros believes that petitioner is suffering from spastic colon. He testified to symptoms of that ailment, including cramping, and noted that it would be worse at altitude.⁷ He believed that the medication's effect would increase at higher altitudes; that Ms. Walker was physiologically dependent on the codeine (Tr. at p. 127); and that 30 mg. could have a central nervous system effect. He discussed various incidents in petitioner's medical history, finding them to be consistent with the possible side effects of her medication.

After reviewing the record in detail, we conclude that the Administrator's appeal must be granted. The continued taking of prescription medicines with potential side effects

⁷He suggested that petitioner would be in "some discomfort" at altitude. Tr. at p. 121.

adverse to safe air operations, especially controlled substances such as codeine, must be given careful scrutiny in light of the risks to air safety that the medications represent (especially the risk of side effects such as drowsiness, dizziness, and lightheadedness). The more fundamental potential of disabling illness while operating an aircraft must also be seriously addressed.

We disagree with the law judge's first conclusion -- that, absent medication, petitioner's illness would have no effect on air safety. At best, an episode while aloft would be extremely distracting, inconsistent with the full attention aircraft operations require. At worst, it would be painful as well.⁸ We cannot countenance an unrestricted certificate in these circumstances.

With regard to the need for constant medication, our comments in William H. Vandenberg, Petition, 3 NTSB 2880, 2882, n.4 (1980) are relevant:

[W]here maintenance of a Petitioner's health is vitally dependent on continuing medical attention and treatment, that individual is not entitled to a medical certificate that neither reflects such dependence nor provides the Administrator with some mechanism for ensuring compliance with the medical requirements on which his sustained health

⁸Although petitioner testified that the condition was not accompanied by cramps or pain, her medical records indicate otherwise. See Exhibit A-1, at pps. 9, 19, 116. And, as noted, stomach cramps can worsen as altitude increases and stomach gases expand.

depends.⁹

In addition, whether petitioner's medication corrects the problem without side effects adverse to air safety is the subject of extensive, conflicting evidence. Although Dr. Clark has more specific credentials regarding the effect of these medications, he is not a gastroenterologist and did not speak to petitioner's illness itself. Dr. Lueros also brought insights from his aviation experience. Overall, we do not find Dr. Clark's testimony adequate to meet petitioner's burden of proof.

At most, his testimony goes to petitioner's condition at the times he observed her, and his general expectations regarding the levels and types of medication she is taking. He cannot, however, testify to, for example, the effect of a different level of medication, especially codeine, should her condition change and/or a greater dosage be taken. Yet, should she be granted the unrestricted airman certificate here sought, there would be no controls on her amount (or type) of medication.

⁹"The existence of good health . . . whether maintained with or without medicine, medical care, or treatment, is not the standard on which qualification for an unrestricted medical certificate is based under Sections 67.15(f)(2) and 17(f)(2) of the FAR. Rather, those sections require . . . that an applicant for a certificate show that he has no medical or physical condition or circumstance that either presently prevents his safe operation of an aircraft or may reasonably be expected, based on medical judgment, to have that effect at any time within the following 2 years." *Id.* at p. 2881, emphasis in original.

Even though petitioner's condition, when controlled with medication, might never interfere with piloting an aircraft, we have on numerous occasions announced our unwillingness to take chances with air safety by treating an individual's "control" of a disease as equal to its prevention or cure.¹⁰ Petitioner's ability to perform daily tasks also does not determine whether her condition would make piloting an aircraft an unsafe activity for her or others. Milford Devir Prosser, Petition, 1 NTSB 482, 483 (1969).

Finally, we note our difficulty relying on Dr. Clark's opinion that 30 mg. of codeine once or twice a day will not affect petitioner's judgment, perception, or reactions. The public safety will not allow us to assume, even if she has not in the past felt any side effects such as drowsiness, that she will never do so while flying, nor will we assume that withdrawal from the medication (which she has attempted in the past) will not produce other side effects adverse to air safety.¹¹ Not only does the Flight Surgeon recommend denial of the certificate, this opinion is confirmed on the record by the Mayo Clinic (Exhibit A-1, p. A5), which indicates it would not support the application of anyone

¹⁰See, e.g., Ring, Petitioner, 19 CAB 888, 890 (1954).

¹¹In any case, the record does not entirely support the notion that she has had no adverse side effects. Not only, as Dr. Luros noted, were some of petitioner's complaints representative of codeine side effects, but a medical record entry for March 13, 1987 states "Believes the medication is what is making her dizzy....Is afraid to take the codeine." Exhibit A-1, p. 116.

taking a controlled substance such as codeine. On this record, we cannot disagree.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is reversed; and
3. The Administrator's order denying a third class airman medical certificate to petitioner is affirmed.

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.